Supreme Court, U.S.
FILED

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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM 1998

BABATUNDE SONIREGUN
Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE
Respondent

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

BOKWE G. MOFOR, ESQ.
Immigration Assistance Center
8121 Georgia Avenue, Suite 102
Silver Spring MD 20910
(301) 588 5028
Attorney for Petitioner

5388

QUESTIONS PRESENTED

a. Whether the Board of Immigration Appeals erred, in violation or statute, regulations and Due process, *inter alia*, when it denied the Motion to Reopen/Reconsider where sufficient and substantial credible evidence was presented to demonstrate that the Petitioner's failure to appear for a deportation hearing was the direct result of prior counsel's "admitted" inappearance or ineffective assistance?

b. Whether the Board of Immigration Appeals erroneously failed to reopen deportation proceeding in violation of statute, regulations and Due process, *inter alia*, where Petitioner presented a strong and meritorious political asylum claim?

LIST OF ALL PARTIES BELOW

The parties to this proceeding in the court below were Babatunde Soniregun and the United States Department of Justice, Office of Immigration Litigation, Civil Division.

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OPINIONS BELOW

The United States Court Appeals for the Fourth Circuit's opinion, App. 1, is unreported. The Fourth Circuit's denial of Petitioner's petition for rehearing, App. 7, is unreported.

JURISDICTION

The Fourth Circuit handed down its ruling on October 19, 1998. Exhibit 1. The Fourth Circuit denied Petitioner's Petition for a Rehearsing on January 6, 1999. Exhibit 2. Pursuant to 8 U.S.C.S. Section 1105a(a)(2) (Law. Co-op.Supp.1991), this Court has jurisdiction over this matter, because this is the judicial circuit in which the administrative proceedings, by the Executive Office for Immigration Review in Baltimore, Maryland, where conducted.

A petition for a writ of Certiorari may be filed on later than 90 days after the date of the issuance of the final deportation order, 8 U.S.C Section 1105a(a)(1) (Supp. II 1990). The Fourth Circuit entered its final decision on January 6, 1999. A petition for review was filed with this Court on or about January 24, 1999.

This petition for review is from a final order that may dispose of all claims with respect to all parties.

STATUTORY PROVISIONS INVOLVED

This petition involves 8 C.F.R § 242 B; 8 U.S.C § 1158 (a) and the Fifth Amendment of the United States Constitution; which are set forth at App

STATEMENT OF THE CASE:

A. PROCEDURAL HISTORY:

This is a petition for a review of the order of the United States Court of Appeals for the Fourth Circuit (hereinafter the Fourth Circuit), wherein it affirmed the decision and order of deportation of the Board of Immigration Appeals (hereinafter, "BIA") which denied the Petitioner's Motion to Reopen/Reconsider. App. 1. The Fourth Circuit also denied Petitioner's Petition for Rehearing.

On or about July 29, 1993, the Immigration and Naturalization Service (hereinafter the "INS"), issued an Order to show Cause (OSC) charging the Petitioner with deportability pursuant to Section 241(a)(1)(B) of the Immigration and Naturalization Act (hereinafter ("INA), as amended (an "overstay"). Petitioner through counsel admitted to the allegation and charges of deportability in the Order to Show Cause.

The Petitioner filed as relief from deportation an application for asylum and Withholding of deportation pursuant to § 208 and § 243(h) of the

Immigration and Nationality Act and an Application for Suspension of Deportation pursuant to INA § 244.

Master calendar hearings were held in New York, N.Y. on behalf of Petitioner. The prior Counsel requested and was granted a charge of venue to Baltimore, Maryland. Subsequently, prior Counsel received notice of the new hearing scheduled on October 11, 1995. Neither Petitioner, nor prior Counsel appeared for the October 11, 1995 hearing. The Immigration Judge in Baltimore ordered Petitioner deported in absentia.

Petitioner filed a Motion to Reopen/Reconsider the proceedings to enable him present his asylum and suspension of deportation applications, arguing that his failure to appear was due to ineffective assistance of counsel. However, the Immigration Judge denied his Motion to Reopen/Reconsider. Petitioner then filed a Notice of Appeal with the Board of Immigration on April 29, 1998. On July 14, 1997, the Board of Immigration Appeals affirmed by a majority decision, with a lengthy dissent from one the Board members, Lory D. Rosenberg, the denial of Petitioner's Motion to Reopen/Reconsider. App. 3 and 4 respectively. A petition for review to the United States Court of Appeal for the Fourth Circuit was filed on or about August 13, 1997. The Fourth Circuit Affirmed the decision of the BIA and

subsequently denied Petitioner's Petition for Rehearing.

B. STATEMENT OF FACTS

Petitioner is a native and national of Nigeria. He has been residing in the United States since on or before 1982. Petitioner has two United States citizen children, one of whom has a medical and development problem and required special medical treatment. Petitioner is actively involved in medical programs designed to benefit children with similar medical conditions as his child.

Petitioner has a long-standing relationship with the mother of both of his children, and they will marry as soon as she is divorced. He also has a United States citizen brother. He is a devout Christian, who fled Nigeria after experiencing several attacks against his father, himself, and the entire family. Petitioner's father is a Christian Minister and an active member of the Social Democratic Party. Petitioner and his father have been arrested, illegally detained and tortured on several occasions. Petitioner came to the United States to escape the threats to his life. Petitioner has received an undergraduate, as well as two master's degree in Education: working with seriously emotionally disturbed children and International Relations respectively, since arriving here in the United States.

Petitioner's counsel received a notice to appear for a hearing in Baltimore, Maryland following a change of venue from New York. But the Petitioner's Counsel mailed the notice to the wrong address. The Petitioner never received the hearing notice. Petitioner's prior counsel admitted that he mailed the hearing notice to the wrong address. App. 27.

Neither Petitioner's Counsel nor the Petitioner himself appeared for the hearing. However, Petitioner's counsel conceded that he had mailed the notice of the hearing to a wrong address. App. 27.

REASONS FOR GRANTING THE WRIT

This case presents important issues of constitutional and immigration law. The crux of the matter before this court is whether a petitioner is required to file a bar complaint in order to establish an ineffective assistance claim and whether he is required to submit an affidavit when the record already contains such evidence.

The Board of Immigration Appeals erred when it declined to rescind an *absentia* deportation order, where petitioner proved that he had not been notified of the hearing. At issue is whether the BIA erred is so holding.

The United Court of Appeals for the Fourth Circuit answered this question in the negative.

By so holding the Fourth Circuit misapplied the law. In so holding the Fourth Circuit departed from its own precedent in which it did not require a bar complaint, to establish an ineffective assistance of Counsel claim.

The Fourth Circuit's decision conflicts with decision of this court and other circuits, and "so far depart[s] from the accepted and usual course of judicial proceedings... as to call for an exercise of this court supervisory power." S. Ct. R. 10(a).

Furthermore, because this case presents violation of due process issues under the Fifth Amendment to the United States Constitution, the Fourth Circuit's decision has ramifications far beyond the present case. For all these reasons, this court should grant the petition.

I. THE FOURTH CIRCUIT ERRED IN UPHOLDING DENIAL PETITIONER'S MOTION TO REOPEN/RECONSIDER

The Fourth Circuit erred, in violation of statute, regulations, and Due Process, *inter alia*, when it denied the motion to reopen/reconsider where sufficient and substantial credible evidence was presented to demonstrate that petitioner's failure to appear for a deportation hearing was the direct result of prior counsels error or ineffective assistance.

A. Standards of Review

The standards of review: In deportation proceedings, the Circuit Courts review credibility and factual findings under the "substantial evidence" standard, but subject mixed questions of law and fact to *de novo* review. *Figeroa v. INS*, 886 F. 2d. 76, 78 (4th Cir. 1989). The Fourth Circuit review BIA decisions involving withholding of deportation under a "substantial evidence" standard. *Campos-Guardao v. INS*, 809 F-2d 285, 289 (5th Cir. 1987). All doubts in construing the immigration laws are to be resolved in favor of the alien due to the potentially drastic consequences of deportation. *INS v. Cardoza-Fonseca, 480* U.S. 421, 449 (1987).

B. Discussion of Issues

The main issues for review are: whether Petitioner is required to file a bar complaint to establish an ineffective assistance of counsel claim; and whether Petitioner is required to submit an affidavit or other evidence when the record already does contain such evidence. The Immigration Judge denied Soniregun's motion to reopen/reconsider. Two of the three Board Panel Members then confirmed the Immigration Judge's decision, and dismissed the appeal. The dissenting Board Member wrote a six- (6) page dissent.

The Majority opinion held that even though Petitioner's prior counsel admitted that he never informed his client (Petitioner) of the scheduled deportation hearing, that showing of ineffective assistance of counsel is not enough to excuse Petitioner's nonappearance, e.g., exceptional circumstances. The Majority, relying on its prior decision in *Matter of Lozado*, 19 I&N Dec. 637 (BIA 1988), *aff'd,* 857 F. 2d 10 (1st Cir. 1988), ruled that Petitioner had not established a claim of ineffective assistance of counsel because he had not satisfied each and all of the Fourth Circuit requirements as set forth in *Lozada, Supra.*

The Fourth Circuit grossly erred in upholding the Board counsel's admitted failure to notified Petitioner of the hearing is undoubtedly an "exceptional circumstances." The Board had taken the position that in order to establish an ineffective assistance of counsel claim, Petitioner was required to file a bar complaint. This decision is in conflict with the Fourth Circuit's ruling in *Figeroa v. INS, supra.* In *Figeroa v. INS, supra*, the Fourth Circuit departed from the *Matter of Lozada, supra* by holding that:

> ...Furthermore, while petitioner took no "action" against Tellez, we fail to see how this indicates that Tellez's representation was effective... Figeroa's new counsel probably recognized that neither a disciplinary proceeding nor a civil action against Tellez

> would have provided petitioner with such assistance in terms of his deportation proceedings. **Their energies were probably directed at stopping the deportation rather than pursuing Tellez.** *Id.* at 17. [Emphasis added].

In this case, immigration attorney represented Petitioner. Initially, they both appeared together for the scheduled deportation hearings (in New York). Then, counsel requested a change of venue to the immigration court in Baltimore, Maryland, because Petitioner and his family had move to Maryland. The request for change of venue was granted. The hearing notice for the next hearing before the court in Baltimore was mailed cnly to petitioner's counsel. Petitioner's counsel then mailed the notice to a wrong address. Petitioner never received notice of the hearing.

Furthermore, even though Petitioner's counsel had an absolute duty to appear at the scheduled hearing, he failed to do so.

Thus, as a result of Petitioner's counsel's admitted malfeasance, Petitioner was grossly prejudice. He was ordered deported in absentia. He has an U.S. citizen family. He is now required to separate from his family and return/reside for at least five years in Nigeria. He faces serious persecution from the recognized brutal and repressive Nigerian regime. He and his family have already suffered serious human abuses in Nigeria.

Significantly, the facts are undisputed. Petitioner's prior counsel admits that he mailed the hearing notice to the wrong address. He admits that he failed to notify Petitioner of the hearing. The Majority Opinion accepts these facts; however, it then fails to conclude that these facts comprise "exceptional circumstances" for why petitioner did not appear for his deportation hearing. It is almost impossible to think of exceptional circumstances more serious or more substantial than those involved and described herein.

Moreover, as noted in the Board's Dissenting Opinion, "Congress contemplated a totality of the circumstances test would be used in determining whether, as a substantive matter, exceptional circumstances to rescind the order [of deportation] exist". (Taken from the Dissenting Opinion of Board Chairman Schmidt in *Matter of Rivera-Claros*, Int. Dec. 3296 (BIA 1996). App. 13.

If the Board had followed congressional guidance, and considered the "totality of circumstances" in this case, it would have found that "exceptional circumstances" do exist.

Furthermore, as described in detail in the Board's Dissenting Opinion, the Board's decision and reliance on *Lozada, supra*, is contrary to this Court's precedent of *Figeroa v. INS*, 886 F. 2d 76 (4th Cir. 1989) and the Board's own prior decisions such as *Matter of Grijalva*, Int. Dec. 343 (BIA

1996) (*Grijalva II*) and *Matter of N-K-/V-S-*, Int. Dec. 3312 (BIA 1997).

As the Dissent states, this Court in *Figeroa, Supra*, held "...that ineffective assistance of counsel may be determined on the evidence of record when it is apparent that the offending counsel did not comport with the minimum level of competence of his client's best interests..." Surely, Petitioner's prior counsel's failure to notify his client of the hearing (and his family additional failure to appear for the hearing) is below the "minimum level of competence" and is, without a doubt, not in his client's best interests." Additionally, this Court held, in ***Figeroa, supra***, that the failure to comply with the prongs of ***Lozada*** was insufficient to deny a claim of attorney negligence. Moreover, as pointed out by the Dissent, the Second Circuit has also found to be **troubling** the "rigid compliance with technical requirements" *Matter of Lozada. See Romero Morales v. INS*, 25 F. 3 d 125 (2nd Cir. 1994), wherein the court "found 'disquieting' the Immigration Judge's failure to examine the particulars of the case before him' in the context of 'either issuing an in absentia ruling or denying the motion to reopen.' *Id.* at 131." See also, *Rabiu v. INS*, 41 F. 3d 879 (2nd Cir. 1994) and *Baires v. INS*, 856 F.2d 89, 91 (9th Cir. 1988).

Additionally, the Board's decision is flawed, in that it found that "[n] one of the prongs of *Lozada* have been satisfied in this case." At least two of the three prongs were met. Petitioner had submitted,

inter alia, a statement from his prior counsel on prior counsel's letterhead paper. This statement was, without a doubt, prior counsel's "response" to the direct or implied allegations of misconduct, e.g., counsel's failure to correctly notify Petitioner of his hearing (and also, implicitly, counsel's failure to appear at the hearing).

Further, the "Motion to Reopen/Reconsider" filed by Petitioner clearly details the alleged misconduct. Moreover, the Board's feeble contention that counsel's "response" and the "Motion to Reopen/Reconsider" "are not evidence" is erroneous and violates Due Process. See also Footnote 4 of the Dissenting Opinion. App. 27.

Finally, as the Dissent argues, not only does the Petitioner establish "exceptional circumstances", which warrant a rescission of the deportation order and reopening of the deportation proceedings, but, alternatively, pursuant to §242B(c), failure to give proper notice of a hearing is a basis for rescission of the in absentia deportation order. In this case, Petitioner's counsel, as his attorney of record, had the absolute duty to ensure that his client received notice of the hearing. See 8 C.F.R. 3.26, 292.5. The Dissenting Board Member clearly articulates the significance of this concept.

> The provision allowing service on an attorney to constitute comparable service on the respondent are reasonable, if at all, only so long as an attorney's failure to act in the

agency's stead in extending such notice accurately and properly is treated as ineffective counsel. The extension of this precept to in absentia proceedings, with their harsh and unforgiving consequences, only can be countenanced if counsel's ineffective conduct is amounting to no notice to the respondent.

In the case of notice, statutorily adequate notice requires that proper information be communicated to the respondent as required. The regulations provide that once a respondent is represented by counsel, service on the attorney constitutes adequate service on the respondent. Therefore, once a respondent is, or reasonably believes herself to be, represented by counsel, [footnote 3 is withheld] that respondent may rely on her counsel to properly notify her of required appearances before EOIR. A failure of counsel to so notify the respondent must constitute a failure of notice.

II. THE BOARD OF IMMIGRATION APPEALS ERRONEOUSLY FAILED TO REOPEN DEPORTATION PROCEEDINGS, IN VIOLATION OF STATUTE, REGULATIONS AND DUE PROCESS, INTER ALIA, WHERE PETITIONER PRESENTED A STRONG AND MERITORIOUS POLITICAL ASYLUM CLAIM

Without any explanation or comment, the Majority Opinion totally fails to discuss or consider Petitioner's strong claim for political asylum, which is an exception to the bar of reopening for five years from an in absentia order of deportation. (§242B of the INA).

As the record shows, Petitioner had filed an application for political asylum and an application for suspension of deportation with supporting documentation with the Immigration Court.

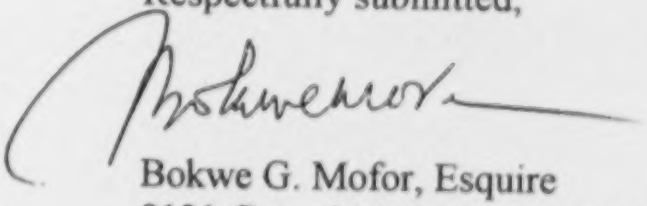
Petitioner raises his political asylum claim in the "Motion to Reopen/Reconsider". Therefore, as demonstrated in the Dissenting Opinion, in accordance with §242B(e)(4) of the INA, Petitioner has a statutory right to reopen his deportation proceedings so that he may seek political asylum.

CONCLUSION

For the foregoing reasons, the Fourth Circuit (and the Board of Immigration Appeals) committed reversible error when it erroneously and prejudicially denied Petitioner's motion to reopen/reconsider.

Wherefore, the Petitioner respectfully requests this Honorable Court to grant the Petition and reverse the judgment of the Fourth Circuit.

Respectfully submitted,



Bokwe G. Mofor, Esquire
8121 Georgia Avenue, Suite 102
Silver Spring, MD 20910
(301) 588 5028

Counsel for Petitioner

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BABATUNDE SONIREGUN
Petitioner

v.

U.S. IMMIGRATION & NATURALIZATION SERVICE
Respondent

No. 97.2060

On Petition for Review of an Order
Of the Board of Immigration Appeals
(A70-578-157)

Submitted: September 30, 1998

Decided: October 19, 1998

Before WILLIAMS and WIDENER, Circuit Judges,
and
PHILLIPS, Senior Circuit Judge

Affirmed by unpublished per curiam opinion.

COUNSEL

Ronald D. Richey, Rockville, Maryland, for Petitioner, Frank W. Hunger, Assistant Attorney General, William J. Howard, Senior Litigation Counsel, Alison Marie Igoe, Office of Immigration Litigation, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C. for Respondent.

OPINION

PER CURIAM

Babatunde Soniregun seeks review of the Board of Immigration Appeals' decision denying his motion to reopen his deportation proceedings. Soniregun's master calendar hearing was held in abstentia as permitted under the Immigration and Nationality Act (INA) § 242 B, 8 U.S.C. § 1252 b(c)(1)(1994)[1], in cases where an alien or his counsel receives written notice of the proceeding, but the alien fails to appear. Because we conclude that the Board did not abuse its discretion in finding that Soniregun's failure to appear at his deportation hearing was not the result of exceptional circumstances, we affirm the Board's denial of the motion to reopen and deny Soniregun's petition for review.

Soniregun contends that the Board abused its discretion in denying his motion to reopen and in

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[1] We note that 8 U.S.C. § 1252 b was repealed in 1996, but at the time this case was heard by the immigration judge, § 1252 b was still applicable.

concluding that he has not shown exceptional circumstances for his failure to appear at his deportation hearing. Soniregun claims that he did not appear because he fails to receive notice of hearing from his attorney and that the motion to reopen should have been granted on that ground.[2] Additionally, Soniregun alleges that the Board failed to reopen his deportation proceedings in violation of statute, regulation, and due process because he presented a strong and meritorious political asylum claim.

This court reviews the denial of a motion to reopen deportation proceedings for abuse of discretion. See INS v. Doherty, 502 U.S.314, 323-24 (1992): Yanez-Popp v. INS, 998 F.2d 231, 234 (4th Cir. 1993). An order of deportation entered in absentia may be rescinded if the petitioner demonstrates that he failed to appear because of exceptional circumstances or if the petitioner establishes that he did not receive proper notice. See INA § 242B (c)(3), 8 U.S.C. § 1252b(c)(3).

We find that the Board did not abuse its discretion in determining that Soniregun did not establish "exceptional circumstances" requiring rescission of

[2] Soniregun concedes that his counsel received notice, but contends that he never received it because of his counsel's ineffective assistance in sending the notice to the wrong address. In support of his claim, Soniregun submitted a letter from his prior counsel in which counsel states that he mailed the notice of Soniregun's deportation hearing with the correct address, but an incorrect apartment number.

the denial of his motion to reopen. INA § 242B(f)(2), 8 U.S.C.A § 1252b(f)(2). Exceptional circumstances are "circumstances (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien." Id. Soniregun contends that his counsel's ineffective assistance in mailing the notice to the wrong apartment number constituted an exceptional circumstance.

To establish ineffective assistance of counsel, an alien must support his claim by a detailed affidavit, inform his prior counsel of he allegation of misconduct, provide counsel with an opportunity to respond and state whether a complaint has been filed with the appropriate disciplinary authorities with respect to the counsel's alleged violation of ethical or legal responsibilities, and if not, why not. See Matter of Lozada, 19 I. & N.637 (BIA 1988). In support of his request for relief, Soniregun submitted an unsworn letter from his prior counsel and an appeal brief. Prior counsle's letter stated that "I sent the letter to the address [Soniregun] provided but mistakenly stated the apartment to be "702" rather that "102" as [Soniregun] had given us. "The letter also stated, however, that" I do not know if this contributed to [Soniregun] not receiving the letter but it did not come back in the mail".

The Board did not err in concluding that statements made in a brief, motion, or letter are not entitled to any evidentiary weight.
See e.g. Ghosh v. Attorney Gen., 629 F.2d 987, 989 (4th Cir. 1980).
We conclude that Soniregun's claim that he failed to receive notice due to his attorney's ineffectiveness does not establish exceptional circumstances. See INA § 242B(f)(2), 8 U.S.C.A § 1252b(f)(2); see also sharma v. INS, 89 F.3d 545, 547 (9th Cir. 1996) (finding that aliens' traffic difficulties did not constitute exceptional circumstances beyond their control).

Further to the extent that Soniregun contends that his absence should have been excused because he did not receive notice, see INA § 242B(c)(3)(B)., 8 U.S.C. § 1252b(c)(3)(B), we find that Soniregun received proper notice when his attorney received notice by certified mail. *See* 8 C.F.R. § 292.5(a)(1998)(requiring notice to be served on attorney, if alien is represented); *see also* INA § 242B(a)(2), (c)(1), 8 U.S.C.A § 1252b(a)(2), (c)(1).

Additionally, Soniregun argues that the Board should reopen his deportation proceedings because he makes a strong and meritorious political asylum claim. The merit of his political asylum claim, however, is not a basis upon which the Board is authorized to reopen deportation proceedings.

See INA § 242B(c)(3), (B), 8 U.S.C.A § 1252b(c)(3). Soniregun also makes passing reference to INA § 242B(e), 8 U.S.C.A § 1252b(e), asserting that this section does not preclude reopening deportation proceedings to reschedule an asylum hearing. The cited statutes, however, relate to the limitations on discretionary relief in certain circumstances and do not govern motions to reopen. The relevant statutes are INA §§ 242 B(c)(3), f(2), 8 U.S.C.A. §§ 1252b(c)(3), 1252(f)(2), the requirements of which, as the Board correctly found, Soniregun did not satisfy.

Accordingly, we affirm the Board's denial of Soniregun's motion to reopen and deny Soniregun's petition for review. We dispense with oral argument because the fact and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH

FILED
January 6, 1999

No. 97-2060
A70-578-157

Babatunde Soniregun

Petitioner

v.

US Immigration & Naturalization Service

Respondent

ORDER

Appellant has filed a petition for rehearing. The Court denies the petition for rehearing.

By the Court

PATRICIA S. CONNOR
CLERK]

UNITED STATES COURT OF APPEALS

FOR THE FOURTH

FILED
January 14, 1999

No. 97-2060
A70-578-157

Soniregun v. INS

MANDATE

The judgment of this court dated 10/19/98 takes effect today.

PATRICIA S. CONNOR
CLERK

U.S. Department of Justice
Decision of the Board of Immigration
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A70 578 157 – Baltimore Date: July 14 1997
In re: BABATUNDE SONIREGUN
IN DEPORTATION PROCEEDINGS
APPEALS
ON BEHALF OF RESPONDENT:
Ronald D. Richey, Esquire
L. Johnson & Associates, P.C
11141 Georgia Avenue, Suite 200
Wheaton, Maryland 20902-4637

ON BEHALF OF SERVICE:
William H. Hallock, Jr.
Assistant District Counsel

CHARGE:
Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251 (a)(1)(B)] –
In United States in violation of law

APPLICATION: Reopening

The Immigration Judge's decision dated April 17, 1996, denying the respondent's motion to reopen, is affirmed.

The record reflects that the respondent failed to appear at his deportation hearing scheduled for October 11, 1995. When the respondent did not appear for the hearing, the Immigration Judge issued the order of deportation. The respondent thereafter submitted a motion to reopen that decision.

On appeal, the respondent claims that his nonappearance should be excused due to his previous attorney's ineffective assistance. The respondent concedes that his previous attorney of record received proper notice of hearing, but the respondent avers that his previous attorney failed to mail notice to his correct address. In support of his motion, the respondent has submitted a letter from his previous attorney in which the attorney states that he mailed notice to the respondent with an incorrect apartment number. The respondent argues that this ineffective assistance satisfies a showing sufficient to excuse his nonappearance.

We find that the reasoning developed in Matter of Lozado, 19 I&N Dec. 637 (BIA 1988), aff'd, 857 F.2d 10 (1st Cir. 1988), is squarely on point in this case. See also Matter of Rivera, Interim decision 3296 (BIA 1996) (alien seeking to reopen in absentia proceedings based upon unsuccessful communications with previous attorney does not establish exceptional circumstances).

Here, the respondent has failed to satisfy a claim of ineffective assistance. To satisfy a claim based upon ineffective assistance of counsel, an alien must support his claim by a detailed affidavit, inform his previous attorney with an opportunity to respond, and state whether a complaint has been filed with the appropriate disciplinary authorities with respect to the attorney's alleged violation of ethical or legal responsibilities, and if not, why not. Lozada, supra.

None of the prongs of Lozada have been satisfied in this case. The respondent submitted an unsworn letter from his previous counsel in support of his claim and an appeal brief. Statements made in a brief, motion, or letter are not evidence and are thus not entitled to any evidentiary weight. See INS v. Phinpathya, 464 U.S. 183, 188-89 n.6 (1984); Ghosh v. Attorney General, 629 F. 2d 987, 989 (4th Cir. 1980); Matter of Ramirez-Sanchez, 17 I & N Dec. 503 (BIA 1980). Accordingly, we find that the respondent has not satisfied a Lozada showing of ineffective assistance rising to the level of exceptional circumstances for his nonappearance.

ORDER: The respondent's appeal is dismissed.

FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE
FOR IMMIGRATION REVIEW
IMMIGRATION COURT
103 SOUTH GAY STREET, RM 702
BALTIMORE, MD 21202

In the Matter of: Case No.: A70-578-157
SONIREGUN, BABATUNDE
Docket: BALTIMORE, MARYLAND
RESPONDENT
IN DEPORTATION PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

On Oct. 11, 1995, at 10:30 A.M., pursuant to proper notice, the above entitled matter was scheduled for a hearing before an Immigration Judge for the purpose of hearing the merits relative to the respondent's request for relief from deportation. However,

(X) The respondent was not present

( ) The respondent's representative was present; however the respondent was not present.

( ) Neither the respondent nor the respondent's representative was present.

Therefore, as no good cause was given in regard to the failure to appear at the hearing concerning the request for relief, I find that the respondent has abandoned any and all claim(s) for relief from deportation.

Wherefore, the issue of deportability have been resolved, it is hereby ordered for the reasons set forth in the Immigration and Naturalization Service charging document that the respondent be deported from the United States to NIGERIA.

_____

BRUCE M. BARRET
Immigration Judge
Date: Oct. 11, 1995

Appeal: WAIVED (A/I/B)

Form EOIR 36 – 7T
KJC

U.S. Department of Justice
Decision of the Board of Immigration
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A70 578 157 – Baltimore Date: July 14 1997

In re: BABATUNDE SONIREGUN

DISSENTING OPINION: Lory D. Rosenberg, Board Member

I respectfully dissent.

I differ with the majority in both the reasoning they employ and the result the y reach in the case before us for many of the reasons stated in my dissenting opinion in Matter of Viallalba, Interim Decision 3310 (BIA 1997); and that in Matter of Rivera-Claros, Interim Decision 3296 (BIA 1996); see also my dissenting/concurring opinion in Matter of W-F-, Interim Decision 3296 (BIA 1996).

Although this appeal involves primarily legal issues and the limited factual matters related to them, it is worthwhile to note that the respondent is a devout Christian who fled Nigeria after experiencing several attacks against his father, a minister, and himself.

Apparently, he personally fought off Muslim attackers and was apprehended and abused by the police. He has two United States children, one of whom has a medical and developmental problem and requires special treatment in which he appears to be actively involved, and he has a longstanding relationship with their mother.

A deportation hearing was conducted on October 11, 1995 before an Immigration Judge. Although the respondent was represented by counsel, neither the respondent or his counsel, Sheldon Walker, appeared. A "Motion to Reopen/Reconsider" was filed on March 21, 1996. While correctly noting that deportation order entered in an in absentia proceeding under 242B(c)(3) may be rescinded only by a motion to reopen establishing either defective notice or exceptional circumstances resulting in failure to appear, the Immigration Judge denied the motion.

Respondent's attorney received notice of hearing in respondent's stead. See 8 C.F.R. 292.5(a)(setting forth the requirement that notice shall be given to an attorney or representative of record acting in a representative capacity); 3.26(b)(stating that proper notice is established if notice is provided either by personal service on the respondent, by certified mail to the respondent, or by certified mail to the respondent's attorney of record.

The prior attorney, by his own admission, mailed the notice to the wrong address, although he had the respondent's correct address. This attorney provided a letter on his office stationary acknowledging that the respondent's failure to receive the notice of hearing was due to the attorney's error.

Nevertheless, the majority refuses to consider the actual substance of the prior attorney's ineffective representation citing our precedent decision in Matter of Rivera-Claros, Interim Decision 3296 (BIA 1996). They maintain this position notwithstanding the applicability of the decision of the United States Court of Appeals for the Fourth Circuit in Figeroa v. INS, 886 F.2d 76 (4th Cir. 1989) which holds that ineffective assistance of counsel may be determined on the evidence of record when it is apparent that the offending counsel did not comport with the minimal level of competence or in his client's best interests, and the general principle that the Board acquiesces to contrary circuit law which is at odds with our administrative precedents.[3]

[3] The Board is bound to follow the law of the United States Court of Appeals for the Ninth Circuit, in which this case arises. See Matter of Anselmo, 20 I & N Dec. 25, 31-32 (BIA 1989); Matter of K-S, 20 I&N Dec. 715, 719-20(BIA 1993).

In essence, I find that rigid compliance with technical requirements such as those in section 242B of the Act or in our decision in Matter of Lozada, 19I&N Dec. 637 (BIA1988), when there is no reason to believe a respondent is deliberately failing to appear for his or her hearing, but fails to comply, through no fault of his or her own is unreasonable. See Romero Morales v. INS, 25 F. 3d 125 (2d Cir 1994). In Romero Morales, the Second Circuit found "disquieting" the Immigration Judge's "failure to examine the particulars of the case before him" in the context of "either issuing an in absentia ruling or denying the motion to reopen." Id. at 131.

I. FACTUAL BACKGROUND

An Order to show cause (OSC) was issued and served by certified mail on July 26, 1993.[4] There is no receipt establishing that this document was received. The record contains a return receipt evidencing certified mail to the respondent on November 23, 1993 for a hearing on January 28, 1994.

The record next contains a letter from respondent's counsel, Sheldon Walker, stamped in by the Executive Office for Immigration Review (EOIR) on January 27, 1994, requesting a

[4] Despite the dates indicated on the OSC it appears that the respondent may have been physically present with only noninterruptive departures since sometime in 1982.

continuance of the master calendar hearing set for that date due to family illness in the attorney's family. The record next contains a certified mail receipt addressed to Attorney Sheldon Walker indicating service of similarly addressed notice of a rescheduled master calendar hearing set for March 18, 1994.

I note that there is no evidence that Sheldon Walker entered an appearance in this case, as the record does not contain Form EOIR-28 so indicated such representation. See also Tr. at 1. Nevertheless, subsequent notices of hearing scheduled for June 14, 1994, March 8, 1995 and August 22, 1995 were addressed to Sheldon Walker, Esquire. See also Tr. at 6. There is no evidence in the record that these notices were sent by certified mail as required, although the respondent and his counsel apparently appeared and hearings took place on these dates.

The respondent filed Form EOIR-33 indicating a change of address on August 22, 1995. The record reflects that a motion to change venue to Baltimore, MD was granted on August 22, 1995, noting the respondent's correct and current address, that Sheldon Walker was his attorney and that any documents were to be submitted by September 21, 1995. The records contains evidence of submission and receipt of such documents on September 20, 1995.

A notice of a master calendar hearing set for October 11, 1995 was issued on September 11, 1995 and signed as accepted by the office of Sheldon Walker on September 16, 1995. This is the notice which the respondent never received. Entry of appearance by respondent present counsel is dated March 19, 1996 unless otherwise terminated the respondent continued to be represented by counsel Sheldon Walker in New York at least until such time. See 8 C.F.R. 3.17 (b) (requiring leave to withdraw as counsel following entry of an appearance.

II. INEFFECTIVE ASSISTANCE OF PRIOR COUNSEL VIOLATES DUE PROCESS

First, an order of deportability entered in absentia will not stand where there has been a failure of notice. Section 242B©. Under the Immigration regulations, it was the prior attorney's duty to give notice and to make sure notice was received. 8 C.F.R. 3.26, 292.5. The provisions allowing service on an attorney to constitute comparable service on the respondent are reasonable, if at all, only so long as an attorney's failure to act in the agency stead in extending such notice accurately and properly is treated as ineffective counsel. The extension of this precept to end absentia proceedings with their harsh and unforgiving consequences only can countenanced if counsel's ineffective conduct is amounting to no notice to the respondent.

In the case of notice, statutorily adequate notice requires that proper information is communicated to the respondent as required. The regulations provide that once a respondent is represented by counsel, service on the attorney constitutes adequate service on the respondent. Therefore, once a respondent is, or reasonably believes herself to be, represented by counsel, [5] that respondent may rely on her counsel to properly notify her of required appearance before EOIR. A failure of counsel to so notify the respondent must constitute a failure of notice.

Second, exceptional circumstances other than lack of proper notice may warrant rescission of the deportation order and reopening of the hearing. One of such circumstance is a situation in which ineffective assistance of counsel prevented the respondent from appearing as required. See Matter of Grijalva, Interim Decision 3243 (BIA 1996) (Grijalva II). We have held that an attorney's failure to give proper notice of a hearing constitutes

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[5] If a respondent has established an attorney-client relationship with someone who is or purports to be an attorney and who agrees to represent the individual in EOIR proceedings, and that individual fail to register his or her appearance with the EOIR, the respondent may rely to her detriment upon that representation. The respondent has no more control over that attorney's actual entry of an appearance than she does over the content or quality of the attorney or representative's advice or representation. I see no reason why that inaction cannot form a basis under section 242B of the Act either for the claim of lack of notice or for the claim of "exceptional circumstances".

ineffective assistance of counsel. Matter of K-/V-S-, Interim Decision 3312 (BIA 1997).

Under the circumstances presented here, where the ineffective counsel claimed in connection with the prior attorney's failure to accurately and properly notify the respondent is apparent on the record, the Immigration Judge's assessment of the respondent's satisfaction of the technical criteria imposed under the Board's decision in Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), which the majority condones, raises the question of the wisdom of a literal reading of that decision. See also, Matter of Riviera-Claros, supra. (Schmidt, dissenting, joined by Guendelsberger, Rosenberg and Villageliu) (emphasizing that Congress contemplated a totality of he circumstances test would be used in determining whether, as a substantive matter, exceptional circumstances to rescind the order exist.)

Although no written understanding of agreement or attestation to such an agreement appears in the record file, its existence is readily and is not contradicted.

The prior attorney's letter reflects a) his representation of the respondent; b) his awareness that the respondent was adversely affected and is dissatisfied as the result of his performance; and c) his admission of fault in light of the inaccurate and improper notice he provided his former client.[6] Moreover, in matters arising with the jurisdiction of the Circuit Court of Appeals for the Fourth Circuit, ineffective counsel may be found without strict compliance with the terms of Matter of Lozada, supra. See Figeroa v. INS, supra.

Although the Fourth Circuit has not specifically addressed the terms of our decision addressing ineffective assistance of counsel in Matter of Lozada, supra, the circuit seems to place primarily emphasis on the practical considerations and due process concerns arising from ineffective assistance of counsel, and does not condition

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[6] I take issue with the majority's reliance on the proposition htat counsel's statements are not competent as evidence in deportation hearings as we routinely allow to make binding representations on client's behalf. Matter of Velasquez, 19 I&N Dec. 377 (BIA 1986) (holding that counsel's admission and concession of his client's deportability is binding on a respondent.) Cf. Matter of Ramirez-Sanchez 17 I&N Dec. 503 (BIA 1980.) We ought to, as a matter of course, abandon the argument that representations by respondent's counsel on his behalf are not acceptable evidence for other purposes so often used to defeat a claim. If representations by counsel are adequate to establish clear, convincing and unequivocal evidence of deportability, counsel's own admissions or the unsworn statements should be adequate to assert a *prima facie* showing which warrants reopening.

remedial action on adherence to peripheral procedural requirements. See also, Rabiu v. INS, 41 F. 3d 879 (2d Cir. 1994) finding failure to file application to constitute ineffective assistance of counsel); Baires v. INS, 856 F. 2d 89, 91 (9th Cir. 1988) (holding that administrative expediency must give way to protection of fundamental rights.) See also Matter of Villalba, Interim Decision 3310 (Rosenberg dissenting.)

In fact, in Figeroa v. INS, supra, the court found specifically that attorney negligence or incompetence is a plausible explanation for failure to file an application. It ruled that lack of corroboration of an ineffective assistance claim is an insufficient reason to deny it, and that failure to contact the offending attorney for a response to the claim of ineffective assistance is similarly not fatal to the claim. The court recognized that an uneducated petitioner was unlikely to be aware of remedies that might be available by filing a complaint with the state bar, and that whatever remedy might follow from such a complaint had little to do with the immediate and far more critical task of overcoming the deportation consequences of such ineffective assistance.

Consequently, I do not believe that Matter of Rivera-Claros, supra, is controlling.

In addition, in my view the elaboration in that case exposes the third prong of Matter of Lozada, supra, which previously might have been rationalized as allowing us to determine valid claims, for what it apparently is. That decision as applied in a case such as this one, reveals that the requirement is wholly inapposite and unrelated to any provision or standard protecting the respondent's interests, or even determining the veracity of the contentions made, and has little to do with due process other than to impede it.

Third, reopening for asylum, at a minimum, is appropriate. The Immigration Judge noted that the record contained evidence of an original and a renewed application for asylum, and an application for suspension. These applications were accompanied by a significant number of documents. I note that the notice which the respondent never received resulting in his failure to appear was for a master calendar hearing. Therefore the failure to appear, even assuming it can be attributed to the respondent, was not for an "asylum hearing" but for a master calendar hearing.

Notwithstanding any dicta to the contrary in the Board's decision in Matter of W-F-, supra, the statutory notice provisions of section 242B and corresponding regulations, are distinct from the regulatory provisions which address motions to reopen to seek relief from deportation.

See, K-Mart Corp. v. Cartier. Inc., 486 U.S. 281, 291 (1988) (holding that a construction of the statutory language which takes into account the design of the statute as a whole is preferred); see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp., 489 U.S. 561 (1989) ("whole statute" interpretation dictates the statutory sections should be read in harmony to achieve a harmonious whole.) See Matter of W-F-, supra (Rosenberg, concurring and dissenting.)

The statutory section includes five pertinent subsections. They relate to failure to appear at a deportation proceeding, section 242B(e)(1), failure to depart under a grant of voluntary departure, section 242B(e)(2), failure to appear under a deportation order, section 242B(e)(3), failure to appear for an asylum hearing, 242B(e)(4), and the relief covered for failure to appear for a hearing under 242(e)(1). Subsections (e)(2), (3), and (4) of the Act require that before these consequences may be imposed for nonappearance of noncompliance, the respondent must be warned orally, and in writing of the consequences.

Denial of reopening to have an asylum hearing is not one of the consequences listed in section (e)(5) which is triggered by failure to appear for a deportation proceeding. Preclusion from reopening to reschedule an asylum hearing is not authorized by the statute.

While 242(e)(1) and (e)(4) may appear to overlap, section 242(e)(4) is the more specific and must control. Gomez, The consequences of Nonappearance: Interpreting New Section 242B of the Immigration and Nationality Act, 30 San Diego L. Rev. 75 (1993) (recognizing that Congress intended to afford asylum-seekers enhanced protection). Consideration of the treatment of access to an asylum hearing before an Immigration Judge in the final bill which was enacted as section 242B of the Act reveals the special treatment afforded asylum-seekers.[7]

If a motion under section 242(b)(C)(3) were interpreted as preliminary to reopening to accept an asylum application and/or hear an asylum claim, section 242B(e)(4) of the Act would be rendered surplusage. Id. at 124. In addition, I note that both Congress and this Board have recognized our international obligations not to return an individual whose life would be threatened or endangered in their home country. Matter of Q-T-M-T, Interim

[7] The conference committee incorporated the five-year bar to all forms of relief originally contained in the Morisson bill, but dropped asylum from the list of relief barred. Notably, the original GAO draft had permanently barred all forms of relief for five years following a nonappearance. See also; original Morrison bill, H.R. 4300, 101st Cong., 2d Sess, Sec. 402(a)(3)(E)iv)(1990). The Smith bill, H.R. 5284. 101st Cong., 2d Sess, sec. 4(b) (1990); and the Brooks bill did not meaningfully affect eligible asylum-seekers, H.R Rep. No. 681, 101st Cong., 2d Sess.(1990).

Decision 3303 (BIA 1996); see also, id. (Rosenberg dissenting).

Under these circumstances, I cannot agree that the respondent should be prevented from presenting his case. See 242B(e)(4)(B).[8] According to the statute, he is not precluded from seeking to reopen his case to seek asylum. See section 242 B(e)(4). I view any attempt to preclude him from such an opportunity on this record to be a violation of the statute, as well as a violation of our international obligations not to turn an individual to their country of origin when they have contented that they would face imminent persecution there. On the facts presented, I would find that the respondent has established ineffective representation compromising his rights to proper notice of his deportation hearing and his obligations under the statute, amounting to a violation of due process. Baires v. INS, supra.

Lory D. Rosenberg
Board Member

[8] I note in this regard that, in fact, the 180 day from order of deportation time limitation which applies to motions to rescind, is conspicuously absent from the statutory language in section 242(e)(4), which talks of exceptional circumstances with no mention of a time limit.

SHELDON WALKER
ATTORNEY AT LAW

101 WEST 31 STREET
14TH FLOOR
NEW YORK, NY 10001

TEL: (212)736-9895

March 19, 1996

Ronald Richey, Esq.
1141 Georgia Avenue, Ste 200
Wheaton MD 20902

RE: Babatunde Sonerigun

Dear Mr. Richey;

I previously represented Mr. Soniregun in New York. I know that he is now in INS custody for failure to appear in Court in Baltimore. The background in this matter is as follow:

We previously filed an asylum application and a suspension application for Mr. Soniregun and on August 22, 1995, we obtained a change of venue at his request to Baltimore.

Upon notice to us that he had a hearing (Master calendar) scheduled for October 11, 1995, I wrote to him advising that he notify his local counsel, or if he did not have same as yet, to retain counsel.

Please note that I sent the letter to the address he provided but mistakenly stated the apartment to be "702" rather than "102" as he had given us. I do not know if this contributed to his not receiving the letter but it did not come back in the mail. Not having heard from him I presumed that he had gotten the letter.

It is important to note that Mr. Soniregun traveled great distances to attend all his New York court dates, so it is illogical to believe that he would refuse to appear at court in his own jurisdiction.

I include herewith copies of his file for your information.

I certainly will stand by him in this matter and wish him the best of luck. It is now 11pm and I hope this letter does not contain undecipherable "typos".

Sincerely,

Sheldon Walker

STATUTORY PROVISIONS INVOLVED

Section 242B: 8 U.S.C. Section 1158(a):

(c) *Consequences of Failure to Appear-*

(1) *In general-* Any alien who, after written notice required under subsection (a)(2) has been provided to the alien or the alien's counsel of record, does not attend the proceeding under section 242, shall be ordered deported under section 242(b)(1) in absentia if the Service establishes by clear, unequivocal and convincing evidence that the written notice was so provided and that the alien is deportable. The written notice by the Attorney General shall be considered sufficient for purposes of this paragraph if provided at the most recent address provided under subsection (a)(1)(F).

(2) *No notice if failure to provide address information-*No written notice shall be required under paragraph (1) if the alien has failed to provide the address required under subsection (a)(1)(F).

(3) *Recission of order-* Such an order may be rescinded only-

(a) Upon a motion to reopen filed within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (f)(2), or

(b) Upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with subsection (a)(2) or the alien demonstrates that the alien was in Federal or State custody and did not appear through no fault of the alien. The filing of the motion to reopen described in paragraph (a) or (b) shall stay the deportation of the alien pending disposition of the motion.

(c) Limitation on Discretionary Relief for failure to Appear

(1) At Deportation proceedings. – Any alien against whom a final order of deportation is entered in absentia under this section and who, at the time of the notice described in subsection (a)(2), was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequence under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (f)(2) to attend a proceeding under section 242, shall not be eligible for relief described in paragraph (5) for a period of 5 years after the date of entry of the final order of deportation.

Ineffective assistance of counsel has been considered as an exceptional circumstance where counsel failed to inform alien of the herein. Ineffective assistance of counsel is often considered a violation of due process under the Fifth Amendment. The Fifth Amendment to the United States constitution provides:

> … nor shall any person be subjected … nor be deprived of life, liberty or property, without due process of law…